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No.

IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM 1981

WAYNE SHERRARD AND JANET SHERRARD, his wife,
Petitioners,

-VS-

DONALD S. OWENS, Judge of Probate, Ingham County Probate Court, et al.,
Defendants.

DEFENDANT DONALD S. OWENS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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ISSUES

I. Is the Court of Appeals' decision in conflict with this Court's decision in *Smith* v *Organization of Foster Families*, 431 US 816 (1977), or other Federal Court of Appeals' decisions on the same issue?

II. Did the Court of Appeals rely solely upon the District Court finding that Petitioners were afforded an adequate due process procedure in Michigan as the sole basis for affirming the District Court decision, and did the State Administrative Law Judge find the Petitioners were not accorded due process?

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ISSUE I

IS THE COURT OF APPEALS' DECISION IN CONFLICT WITH THIS COURT'S DECISION IN *SMITH* v *ORGANIZATION OF FOSTER FAMILIES*, 431 US 816 (1977), OR OTHER FEDERAL COURT OF APPEALS' DECISIONS ON THE SAME ISSUE?

Petitioner answers "Yes."

Respondent answers "No."

In *Smith* v *Organization of Foster Families*, 431 US 816 (1977), this Honorable Court found:

> Where, as here, the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties. In this case, the limited recognition accorded to the foster family by New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty' in the foster family.

District Court Judge, the Hon. Douglas W. Hillman, specifically made reference to the contractual arrangement between the Sherrards and the placement agency, Child Services of Michigan, Ingham County Branch:

> Among other provisions of this agreement, the Child and Family Services of Michigan agreed to resume the responsibility 'to determine permanent plans for the child and to work out plans with natural and adoptive parents.' Page 29, Hillman Opinion

Thus, in the instant case, as in the *Smith, supra.*, there was a contractual agreement entered into by the foster parents by which the placement agency retained control over the children, and, of course, whereby the foster parents were paid for keeping the children in their home, all of which argues against any but the most limited constitutional "liberty" in the foster family.

In *Smith, supra.*, the court, after discussing the issue of liberty interest, decided the case on other grounds. Even assuming that there is a protected liberty interest, the Court found that the pre-removal procedures employed by the State of New York were constitutionally sufficient.

Although the *Smith, supra.*, court elected to decide that case on another issue, it did give some guidance to subsequent Court of Appeals cases. In *Drummond* v *Fulton County Department of Family and Child Services*, 563 F2d 1200 (5th Cir 1977), *cert denied*, 437 US 910 (1978), the State had designated some foster parents for a mixed race child for over two years. The child was approximately one month old at the time he was placed with the foster parents. The *Drummond, supra.*, court held:

> During this process in Georgia, children are placed in foster homes as an alternative to institutional care for what is clearly designated as a transitional phase in the child's life. Ga. Code Ann. §24A-1403 (1976) Foster parents are thus considered only on the basis of the quality of temporary care they can be expected to provide. Therefore, in the eyes of the state, which creates the the foster relationship, the relationship is considered temporary at the outset and gives rise to no state created rights in the foster parents. (P 207)

The Court went on to hold:

> There is no basis in the Georgia law, which creates the foster relationship, for a justifiable expectation that the relationship will be left undisturbed. cf. *Perry* v *Sindermann*, 408 US 593, 92 S Ct 2694, 33 L Ed 2nd 570 (1972). True liberty rights do not flow from state laws, which can be repealed by acts of the legislature. Unlike property rights they have a more stable source in our motions of intrinsic human rights. The very fact that the relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adoptive family by any court,

> demonstrates that it is not a protected liberty interest, but an interest limited by the very laws which create it. See *Bishop* v *Wood*, 426 US 341, 96 S Ct 2074, 48 L Ed 2nd 684 (1976).

This Supreme Court denied a petition for Writ of Certiorari in the *Drummond, supra.*, case.

Plaintiff in his brief cites considerable language from the dissent in the *Drummond, supra.* case. However, it should be remembered that it is just that—the dissent.

Another Court of Appeals court has considered this question. In *Kyees* v *County Department of Public Welfare*, 600 F2d 693 (7th Cir 1979), the court was faced with the situation where a nine-month old child was placed with foster parents and remained with these foster parents for approximately two years. The *Kyees, supra.*, court found:

> . . . In this case, as in *Smith*, the likelihood of vitural certainty of eventual termination of the foster relationship is made clear in state statutes and in the contracts executed by the foster parents. Because they can be extended by the state, foster families must, then, be seen as enjoying considerably more limited 'liberty' than natural families or those related by adoption. (P 698)

The Court went on to state:

> In *Drummond* as well as here, there were facts indicating the development of strong emotional ties between the foster parents and foster child. In both situations the foster care relationship continued for approximately two years before termination by the state agency. In each case, it could fairly be said that the foster parents at least had reason to believe that the state agency reserved the right to terminate the relationship.
>
> The majority of this panel, Judges Pell and Foreman, are persuaded by the reasoning of *Drummond* as

> ultimately decided, and conclude that the question left open by the Supreme Court in *Smith* should be decided aversely to the existence of a liberty interest in a foster care arrangement of the nature and duration considered here. (P 698-699)

In the case presently before this Court, the argument of the foster parents is even less compelling than that contained in either *Drummond* or *Kyees, supra.*, in that these foster parents only had the children for one year, rather than two years, and these children had, in fact, lived with their natural parents, their grandmothers and another foster family before arriving at the Sherrards for placement, at the ages of five and two.

This Defendant submits that the District Court opinion of the Hon. Douglas W. Hillman, affirmed by the 6th Circuit Court of Appeals, is in accordance with the decisions of *Smith, Kyees,* and *Drummond, supra.*, all of which have ruled adversely as to existence of a liberty interest in a foster care arrangement.

ISSUE II

DID THE COURT OF APPEALS RELY SOLELY UPON THE DISTRICT COURT FINDING THAT PETITIONERS WERE AFFORDED AN ADEQUATE DUE PROCESS PROCEDURE IN MICHIGAN AS THE SOLE BASIS FOR AFFIRMING THE DISTRICT COURT DECISION, AND DID THE STATE ADMINSTRATIVE LAW JUDGE FIND THE PETITIONERS WERE NOT ACCORDED DUE PROCESS?

Petitioner answers "Yes."

Respondent answers "No."

Plaintiff attempts to assert that the Administrative Law Judge found that Petitioners were not accorded due process. First of all, even had the Administrative Law Judge made such a finding, it is not binding upon the District

Court, the Court of Appeals or the Supreme Court. However, the Administrative Law Judge simply did not make such a ruling. The Administrative Law Judge did recommend a finding that Section 92 of the Michigan Administrative Procedures Act was not complied with, but said decision made no finding whatsoever that due process had been violated. (Appendix A-22)

In any event, the Hon. Douglas W. Hillman, affirmed by the United States Court of Appeals, Sixth Circuit, did not rest the decision solely upon the sufficiency of Michigan Administrative Procedures in disposing of Plaintiffs' action by summary judgment, but rather spent a lengthy amount of time discussing the absences of a "liberty" interest of these Plaintiffs, and this Defendant argues that it is on this basis that Petitioners' Petition for Writ of Certiorari should be denied.

CONCLUSION

Based upon the foregoing, the Respondent Donald S. Owens prays that Plaintiffs Petition for Writ of Certiorari be denied.

Respectfully submitted,
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